BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
	)	CC Docket No. 96-128
The Michigan Pay Telephone Association's	)	
Petition for Declaratory Ruling Regarding	)	
The Prices Charged by AT&T Michigan	)	
for Network Access Services	)	
Made Available to Payphone Providers in	)	
Michigan.	)	

TAB 1 ATTACHED TO THE MICHIGAN PAY TELEPHONE ASSOCIATION'S SECOND PETITION FOR DECLARATORY RULING

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **MICHIGAN PAY TELEPHONE ASSOCIATION** et al., against **AMERITECH MICHIGAN** and **GTE NORTH INCORPORATED.**	)))))	Case No. U-11756 (After Remand)

At the March 16, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On August 10, 1998, the Michigan Pay Telephone Association (MPTA) filed a complaint regarding rates for the payphone services offered by Ameritech Michigan (now SBC Michigan [SBC]) and GTE North Incorporated (now, Verizon North Inc. [Verizon]). The MPTA's complaint sought a Commission determination that SBC and Verizon had failed to comply with certain provisions of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq., the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq., and orders issued by the Federal Communications Commission (FCC). Specifically, the complaint sought Commission determinations concerning whether (1) prices for network services were consistent with the new services test (NST) adopted by the FCC; (2) respondents' payphone operations are required to pass

an imputation test pursuant to Section 362 of the MTA, MCL 484.2362; and (3) payphone services respondents provide to independent payphone operators (IPPs) are discriminatory.

Following a contested case hearing, Administrative Law Judge Daniel E. Nickerson, Jr., issued his Proposal for Decision (first PFD) in which he concluded that SBC and Verizon had not complied with the NST. SBC and Verizon filed exceptions to those conclusions.

On March 8, 1999, the Commission issued an order in which it found that the MPTA had failed to meet its burden to show that SBC's and Verizon's payphone service rates did not comply with NST. The Commission further stated that it was not persuaded either that the NST required it to adopt the MPTA's approach, or that the results of that approach would be preferable to the rates then in place. The Commission specifically rejected the MPTA's assertion that the services sold to IPPs should be compared to the wholesale unbundled network elements (UNEs) sold to providers of basic local exchange service, which were priced in Cases Nos. U-11280 and U-11281. The Commission found that IPPs should be charged as business customers, not as wholesale customers.

The Commission further rejected the MPTA's position that the end-user common line (EUCL) charge must be deducted from rates imposed on IPPs. However, the Commission did find that Section 362 of the MTA, MCL 484.2362, required SBC and Verizon each to perform and file an imputation analysis and subsidy analysis regarding IPP services within 45 days of the date of the order.

The MPTA appealed the March 8, 1999 order to the Michigan Court of Appeals (Court of Appeals). On October 23, 2001, the Court of Appeals affirmed the Commission's determinations in an unpublished opinion in its Docket No. 219950.

Thereafter, the MPTA applied for leave to appeal to the Michigan Supreme Court. While that appeal was pending, on March 4, 2002, the FCC entered an order finding that the Commission's March 8, 1999 order appeared to be inconsistent with the FCC's order in In the matter of Wisconsin Public Service Commission, CCB/CPD No. 00-01, Memorandum and Opinion and Order, rel'd January 31, 2002 (Wisconsin Order). In April 2002, the MPTA and the Commission filed a joint motion before the Michigan Supreme Court to remand this matter back to the Commission for further consideration in light of the Wisconsin Order. On June 24, 2002, the Michigan Supreme Court vacated the Court of Appeals' decision and remanded this case back to the Commission. MPTA v MPSC, 466 Mich 883 (2002).

On July 10, 2002, the Commission set a briefing schedule for the remanded proceedings. However, in its October 3, 2002 order, after examining the filed briefs, the Commission found that the parties should be given the opportunity to supplement the record before the Commission decided how the Wisconsin Order would affect this case and whether any refunds might be appropriate. Moreover, the Commission noted that the Wisconsin Order was then pending on appeal. The Commission reasoned that the extended time might allow for action to be completed on that appeal. The Wisconsin Order was affirmed in all respects by the United States Court of Appeals for the District of Columbia on July 11, 2003.

On November 5, 2002, a prehearing conference was held before Administrative Law Judge Barbara A. Stump (ALJ). The MPTA, SBC, Verizon, AT&T Communications of Michigan, Inc. (AT&T), MCI WorldCom (MCI), and the Commission Staff (Staff) participated in the proceedings. Evidentiary hearings for cross-examination were held on April 8 and 9, 2003. The record after remand consists of 772 pages of transcript.

Except for the Staff, all participants filed briefs and reply briefs on May 9 and 30, 2003, respectively. On June 30, 2003, the ALJ issued her Proposal for Decision (PFD) in which she concluded that the Commission's original findings and conclusions in this case were supported by the record and the law, and should be reaffirmed. She therefore recommended that the Commission deny the MPTA's complaint in its entirety.

On July 21, and August 4, 2003, the MPTA, SBC, Verizon, AT&T, and MCI filed exceptions and replies to exceptions, respectively.[1]

On January 30, 2004, the MPTA filed supplemental authority for its position, which is comprised of a November 12, 2003 Proposed Interim Order of the Illinois Commerce Commission (ICC) involving similar issues as the present case. On February 23, 2004, Verizon filed a response to the MPTA's supplemental authority.[2]

II.

LEGAL FRAMEWORK

Federal

Section 276 of the FTA, 47 USC 276 provides in part:

> (a) . . .[A] Bell operating company that provides payphone service
>
> > (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
> > (2) shall not prefer or discriminate in favor of its payphone service.

[1]In the exceptions and replies to exceptions filed by AT&T and MCI, these parties state their general concurrence with the MPTA's filings. This order reflects arguments raised by these parties only when they specifically discuss them in those filings.

[2]The Illinois decision is based on a different record and a different state statute. It is not binding on this Commission, and has little or no persuasive effect in this case.

(b) Regulations

> (1) In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after date of enactment of the Telecommunications Act of 1996, the [FCC] shall take all actions necessary . . . to prescribe regulations that
> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;
> (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subpargraph (A);
> (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry III (CC Docket No. 90-623); . . .

In Section 276(c), Congress expressly provided that state requirements inconsistent with the FCC's regulations promulgated pursuant to this section are preempted.

In 1996, the FCC issued orders implementing 47 USC 276 in which, among other things, the FCC required Bell operating companies (BOCs) to comply with the NST when setting prices for network services sold to IPPs (collectively referred to as the Payphone Orders).[3]

The NST requires that rates be set to recover the forward-looking direct cost of providing the service, plus a reasonable amount of overhead. In the Wisconsin Order, the FCC found that states

[3] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (9/20/1996), Order on Reconsideration, 11 FCC Rcd 21233 (11/8/1996), aff'd in part and remanded in part, Illinois Pub Telecommunication Assoc v FCC, 117 F3d 555 (CADC, 1997), Second Report and Order, 13 FCC Rcd 1778 (10/9/1997), vacated and remanded in part, MCI Telecommunications Corp v FCC, 143 F3d 606 (CADC, 1997), Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (2/4/1999), aff'd American Public Communications Counsel v FCC, 215 F3d 51 (CADC, 2000).

setting payphone rates may use TELRIC or TSLRIC[4] to determine forward-looking costs, with an added amount to recover overheads using UNE loading factors or, at the state's discretion, either the methodology explained in the FCC's Physical Collocation Order[5] or that explained in its Open Network Architecture (ONA) Order.[6]

Although the FCC found that it had no authority to require any provider other than the BOCs to comply with these structural safeguards, it encouraged state commissions to examine whether the same requirements could be applied to all local exchange companies that provide payphone service. In the FCC's view, the imposition of these requirements upon all providers would likely increase the number of, and competition between, payphone providers, which the FCC found would benefit the general public.

State

Section 201 of the MTA, MCL 484.2201, provides the Commission jurisdiction to administer the MTA and all federal telecommunications laws, rules, orders, and regulations that are delegated to the state. That section further admonishes the Commission to exercise its jurisdiction and authority consistent with the MTA and applicable federal law.

Section 318 of the MTA, MCL 484.2318, prohibits a local exchange service provider from discriminating in favor of its, or an affiliate's, payphone service over a similar service offered by

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[4]TELRIC refers to total element long run incremental cost. TSLRIC refers to total service long run incremental cost. Both are forward-looking costs often used to set prices for unbundled network elements.

[5]In the matter of Local Exchange Carriers' Rates, Terms and Conidtions for Expanded interconnection Through Physical Collocation for Special Access and Switched Transport, CC Docket No. 93-162, Second Report and Order, FCC 97-208, 12 FCC Rcd 18730 (1997).

[6]In the matter of Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC Order 93-532, 9 FCC Rcd 440 (1993).

another provider. Further, that section requires each local exchange carrier in Michigan to comply with all nonstructural safeguards adopted by the FCC for payphone service.

III.

DISCUSSION

Effect of the Wisconsin Order

SBC and Verizon argued that the Wisconsin Order changed the NST such that if the Commission were to find SBC's rates fail to comply with the NST, it should do so on a prospective basis only. The MPTA argued that the Wisconsin Order merely clarified the FCC's previous orders concerning the NST. After reviewing the arguments, the ALJ rejected each of SBC's arguments and concluded that the Wisconsin Order did not change the NST, but merely clarified it.

SBC and Verizon except and argue that the NST has changed since its original formulation. They argue that the Wisconsin Order contains holdings that represent substantive changes in the NST. For example, they argue, the NST now requires that payphone rates, including overhead allocations, be established on the basis of forward-looking costs, and permits states to adopt TELRIC pricing. Another new issue, according to SBC, is the requirement that the subscriber line charge (SLC) be removed from payphone rates. Additionally, SBC argues, the Wisconsin Order states that local usage is now subject to the NST. Finally, SBC notes, rates for payphone services provided to IPPs may now include certain retail costs in calculating direct costs.

The Commission finds that the Wisconsin Order did not change existing law. Rather, it is a reiteration of the requirements that the FCC set forth in its 1996 payphone orders, and merely restates and clarifies what the law according to the agency is and has been.

The Commission rejects the argument that the inclusion of forward-looking cost methodologies in calculations for purposes of the NST changed the substance of the NST. The ALJ

correctly noted that the FCC had rejected this claim by finding that the FCC's "longstanding precedent shows that [the FCC has] used forward-looking cost methodologies where [it has] applied the [NST]." Wisconsin Order, ¶43.

The Commission further rejects the contention that permission to use TELRIC pricing modified the NST. In the Wisconsin Order, the FCC specifically found this portion of the Common Carrier Bureau's order clarified the NST, and did not create new standards. The FCC rejected the proffered interpretations of its previous orders that might indicate otherwise. See Wisconsin Order, ¶ 64.

Further, the Commission rejects the argument that requiring the payphone rate to be reduced by the SLC makes the Wisconsin Order new law, rather than a clarifying statement. On this issue, the FCC in the Wisconsin Order affirmed the Bureau's determination in the underlying order, which was explicitly based on longstanding FCC precedent in applying the NST. See FCC DA 00-347, rel'd March 1, 2000, ¶12. Thus, accounting for all revenue sources cannot be said to be a new requirement first stated in the Wisconsin Order.

Likewise, the Commission rejects the argument that submitting usage charges to the NST was new at the time of the Wisconsin Order. The Commission notes that the FCC specifically relied upon its prior Payphone Orders in finding that all charges for payphone service must be subjected to the NST, and rejected interpretation of those orders that argued otherwise.

Finally, the Commission finds that the FCC's comment that certain retail costs could be included in direct costs for providing payphone services does not render the decision new law. Rather, the FCC merely noted that those costs have never been precluded from recovery to the extent they are properly justified.

Applicability of the NST to Verizon

The ALJ found that the Commission had previously decided the issue concerning whether Verizon's payphone service rates must comply with the NST and that the issue was not among those remanded by the Michigan Supreme Court. Verizon excepts and argues that the Commission should reconsider its position in light of the FCC's finding that it did not have the authority to require local exchange carriers other than BOCs to comply with Section 276. It argues that the Wisconsin Order and the affirming appellate order recognize that Section 276 does not apply to non-BOCs, such as Verizon.

The Commission rejects Verizon's arguments that its payphone service rates should not be subjected to the NST. The Commission previously discussed this issue in the March 9, 1999 order in this case. That discussion and its conclusions are hereby reaffirmed. Moreover, the Commission's October 2, 2002 order stated that this issue would not be revisited on remand. Id., pp. 4-5.

Compliance of Payphone Rates with the NST

On this set of issues on remand, the ALJ found that the MPTA failed to meet its burden of proof of the allegations that the payphone service rates of SBC and Verizon do not comply with the NST. Among other things, the ALJ concluded that the MPTA had failed to distinguish the retail services it purchases from the other retail offerings of these two local exchange carriers (LECs). Moreover, she stated that even if the Commission found that the Wisconsin Order modified the NST, that the IPP service rates for both providers are compliant with the NST. Specifically, the ALJ rejected the arguments that SBC and Verizon should be required to use the UNE methodology to calculate overhead allocations when setting rates for IPP services. The ALJ noted that the FCC has taken the view that methods to demonstrate compliance with the NST are not limited to TELRIC or TSLRIC, although states are permitted to use those methodologies. She

found that the FCC approved three methods for demonstrating compliance with the NST, with no single method required or preferred for justifying the overhead allocation factors.

Finally, the ALJ found that both SBC and Verizon properly applied their respective methodologies to demonstrate that their IPP rates comply with the NST. She rejected the MPTA's argument that the EUCL must be subtracted from the IPP rates. The ALJ found that the EUCL charge is an intrastate charge that was not referenced in the Wisconsin Order and is beyond the FCC's jurisdiction.

The MPTA excepts to these findings and conclusions, and, backed by AT&T and MCI, argues that neither LEC has demonstrated that its IPP rates comply with the NST. On the other hand, SBC and Verizon support the ALJ's conclusion that the MPTA failed to meet its burden of proving that the IPP rates do not comply with the NST.

As reflected in the discussion below, the Commission finds that, except for the ALJ's treatment of the EUCL charge, the PFD's conclusion that SBC and Verizon sufficiently demonstrated that their respective IPP rates comply with the NST should be affirmed.

Permissible Considerations

A. Business Line Rates

In its first exception, the MPTA argues that the ALJ inappropriately compared the LECs' IPP and business rates when reviewing whether those rates complied with the NST. According to the MPTA, the FCC explicitly rejected the comparison of IPP rates to business rates when determining compliance with the NST. The MPTA quotes the following from the Wisconsin Order:

> The LEC Coalition claims that BOCs are free to apply to payphone line service rates whatever markup over direct cost is incorporated in their business line rates, even though business line rates may include subsidies for other BOC services. The Coalition asserts that BOCs have virtually unlimited flexibility in determining the overhead component of payphone service rates because "the amount of overhead costs that are recovered in the rate

> does not affect whether the rate is based on costs." The LEC Coalition argues that any overhead loading a BOC might choose is "reasonable" for purposes of the [NST] so long as it is justified by "some plausible benchmark."
>
> We reject the LEC Coalition's argument. . . We have not simply accepted any "plausible benchmark" proffered by a BOC.

Id. ¶¶55-56 (footnotes deleted). MPTA exceptions, p. 12 (emphasis deleted).

The MPTA argues that any reliance on the Commission's 1999 order in this proceeding is wrong, and the Commission should not follow the ALJ's "complete disregard" of the Wisconsin Order and the FCC's subsequent finding that the Commission's 1999 order appeared to be inconsistent with the Wisconsin Order.

SBC responds that the ALJ's comparison of IPP rates and services to those provided to business lines is a reasonable analysis under the circumstances, and that such comparison has not been foreclosed. It argues that the Wisconsin Order does not preclude that comparison. Moreover, SBC argues, neither the Commission's 1999 order nor the PFD rely solely on a comparison of SBC's IPP rates to its business line rates, but rather rest on the totality of the record evidence. SBC argues that its original cost data and the supplemental comparative services analysis that it produced on remand amply support the ALJ's conclusion. SBC argues that even without the business line comparison, the Commission may adopt the ALJ's recommendations.

SBC further argues that the comparison of business line rates to IPP rates was not done as a substitute for the NST analysis, but rather as a response to the MPTA's claim that SBC must use a uniform overhead loading methodology based on UNE pricing. SBC notes that the business rate comparison was used as more of a reality check to explain why a deviation from the MPTA's suggested methodology is appropriate.

Verizon argues that this exception is a straw man argument that mischaracterizes the ALJ's observations that were based on the Commission's 1999 order by taking them out of context. It

notes that the Commission's 1999 finding that IPPs are business customers means only that they are not entitled to purchase payphone services at wholesale or UNE rates. Verizon states that the FCC has repeatedly sustained that proposition, and it argues that there is no inconsistency between that conclusion and the Wisconsin Order.

The Commission is persuaded that it may compare business line rates with IPP rates as one factor to be examined in its assessment of whether the companies' IPP rates comply with the NST. Further, the Commission is still persuaded that IPPs are not telecommunications providers, which are entitled to obtain services provided by the LECs at UNE rates. However, the Commission does not conclude that IPPs should necessarily be treated the same as all other retail customers, because of legal constraints on payphone service rates outlined above. Rather, it is incumbent upon the Commission to determine whether the IPP rates of these two LECs meet the NST as expressed by the FCC in the Wisconsin Order. That analysis requires resolving the question whether IPP rates recover the direct costs of the services provided and a reasonable allocation of the LEC's overhead. As SBC notes, the Wisconsin Order does not prohibit looking at business line rates as a point of comparison. However, that order does require that the LECs provide more than evidence of such a comparison to justify their IPP rates.

B. Congressional Intent to Encourage Widespread Payphone Deployment

The MPTA argues that the ALJ failed to recognize a Congressional "mandate" for wide-spread deployment of payphones. It argues that the PFD is without any discussion concerning the impact of non-cost-based rates on the MPTA and the related decline in the number of payphones in Michigan during the period following April 15, 1997. It argues that the record reflects a drop of 21% in the number of payphones in Michigan from 1999 to 2001. The MPTA further argues that the Commission is obligated to enact policies and issue orders that encourage the widespread

deployment of payphones. Increasing the cost of doing business, it argues, will not further that goal. According to the MPTA, adoption of its proposed TSLRIC-based rates will encourage additional payphone deployment.

SBC responds that the evidence in the record suggests that it is not IPP rates that are hurting the deployment of additional payphones. Rather, SBC argues, the industry has been affected by a combination of over-investment, aggressive business expansion, and large debt burdens, as well as the increased availability and affordability of wireless technology, with its mobility and convenience. SBC argues that a decrease in its IPP rates will not affect those factors.

Verizon adds that the MPTA's argument is both misplaced and moot. Verizon argues that the MPTA did not advance an argument in its initial or reply briefs concerning payphone deployment. It argues that the Commission should not fault the PFD for not addressing an argument that the MPTA did not raise.

There is little doubt that the Congress sought to encourage the deployment of payphones both in number and dispersion. Congress considered such deployment to be a benefit to the general public. Congressional belief that IPPs could be discouraged from deployment of payphones, if the LEC with which they competed was able to charge unreasonable prices for IPP service, is also apparent from the statute. Pursuant to state and federal mandates, the Commission cannot and will not permit the LECs to charge rates that are in excess of that permitted by the NST. However, the Commission agrees with SBC that there are many factors working against the viability of payphones in Michigan, perhaps the most important of which is the availability and popularity of wireless phone use.

Application of the NST

The MPTA argues that to reach her finding that the IPP rates for SBC and Verizon comply with the NST, the ALJ ignored record evidence and employed a strained analysis to explain her findings. Moreover, the MPTA argues, the ALJ accepts cost evidence that has been previously rejected by the Commission and that uses overhead methodologies that do not comply with the FCC prescribed methodologies. The MPTA argues that the Commission may not approve IPP rates that are based on cost studies that were rejected as being invalid.

A. SBC

As the complainant, the MPTA has the burden to demonstrate that SBC did not properly use the chosen method, or that proper use of the comparable services method would result in a finding that IPP rates do not comply with the NST.

MPTA attempts to meet this standard by arguing that SBC failed to adhere to the requirements of the comparable services analysis that it used to justify its rates. It argues that SBC did not perform any sort of method in its May 1997 compliance filing. Rather, the MPTA argues, SBC's witness Dr. Kent A. Currie presented his version of the comparative services analysis only after remand.

Further, the MPTA argues, SBC used an average overhead, which the FCC specifically rejected, when it held that the maximum overhead loading allowed cannot exceed the lowest overhead amount applied to any rate attributable to the comparable services. Citing ¶53 of the Wisconsin Order, the MPTA insists that SBC must identify on a rate element by rate element basis, the direct cost of the comparable service and determine the overhead loadings associated with that service. The appropriate overhead loading for any particular element is the lowest resulting overhead when costs are subtracted from rates for comparable services. In contrast, the

MPTA argues, SBC's analysis results from aggregating revenues from at least eight different services or groups of services when constructing the revenue amount that is ultimately compared to SBC's costs.

The MPTA goes on to argue that SBC's proposed comparable services analysis ignores the actual costs incurred by SBC as verified by SBC. In fact, the MPTA argues, SBC's proposed direct costs vary significantly from those costs that SBC verified to the Commission that SBC incurs when providing payphone service to itself, as reflected in the imputation analysis submitted pursuant to the Commission's March 8, 1999 order. The MPTA argues that if SBC had used the costs from the imputation analysis, the resulting overhead allocation percentage would be very close to that proposed by the MPTA, using SBC's approved TSLRIC costs and UNE overhead allocations. Moreover, the MPTA argues, Dr. Currie admitted that he ignored the EUCL charges in his analysis.

SBC responds that the ALJ properly rejected the MPTA's assessment of the direct cost studies that SBC relied upon, because that assessment is factually and legally erroneous. In SBC's view, the MPTA has misread the PFD and has mischaracterized the state of the law.

Further, SBC argues that the ALJ did not ignore the MPTA's arguments. Rather, it argues, the ALJ dismissed with explanation the MPTA's claim that the Commission had previously rejected the cost studies relied upon by SBC. SBC argues that the MPTA has erroneously used statements made by SBC and Verizon (that the Commission accepted SBC's and Verizon's earlier cost studies and supporting papers after requiring certain modifications) to support its contention that these parties admitted that the Commission previously rejected each of their respective cost studies.

SBC represents that it used the comparable services method as described in the FCC's Physical Collocation Order. SBC argues that it (1) used total direct costs for SBC's payphone operations using the TSLRIC cost-based studies submitted to the Commission in May 1997; (2) determined the total overhead margin recovered on those payphone operations by subtracting the direct costs from the aggregate revenues received; and (3) divided the total overhead margin by the direct costs to develop an overhead loading factor as a percentage of direct costs. SBC argues that because the overhead loading factor for its own retail payphone service exceeds the overhead loading factor for the service provided to IPPs, the latter meets the NST.

SBC argues that the MPTA did not present any new or additional evidence in this remand proceeding and did not change any of its theory, methodology, or application of the NST, and thus failed to meet its burden of demonstrating that SBC's IPP rates do not comply with the NST. Moreover, it argues, the MPTA did not respond to any of Dr. Currie's criticisms of the MPTA's proposed costs and methodology. Therefore, SBC submits, the MPTA did not meet its burden of proof as the complainant in this proceeding.

As to the MPTA's claim that the PFD relies on rejected direct costs, SBC argues that the previous cost studies were not rejected, but rather approved with modification. Moreover, it argues that, prior to the remand of this proceeding, the Commission accepted the submitted costs from SBC's earlier cost studies and supporting papers, and, SBC argues, the decision to do so is not subject to re-litigation. Thus, SBC argues, the MPTA's arguments on this issue are correctly identified in the PFD as beyond the scope of this proceeding.

SBC further argues that the MPTA would have the Commission adopt the cost data that is not based on the data used by SBC's cost witness in the original proceeding, but rather on the MPTA's attempt to estimate what SBC's costs should be. In contrast, SBC argues, the data provided by

both its original witness and Dr. Currie, who testified in the remand proceeding, are based on actual SBC data and are more accurate than the data used by the MPTA's witness. Even so, SBC asserts, that data underestimates SBC's actual costs.

SBC further argues that the ALJ correctly concluded that its comparable services methodology complies with the FCC requirements and rejected the MPTA's arguments to the contrary. In SBC's view, the ALJ's findings are credible, reasonable, supported by the record, and should be upheld. It argues that contrary to the MPTA's argument, the comparable services analysis is intended to examine the costs and overhead allocation for complete comparable services, rather than individual rate elements. SBC argues that Dr. Currie demonstrated that SBC's IPP rates recover an overhead allocation that is less than that recovered through the comparable services test. Therefore, SBC argues, the Commission should affirm the ALJ's determination that the NST has been satisfied in relation to SBC's IPP rates.

SBC goes on to argue that Dr. Currie calculated average overhead allocations because (1) the comparable services in this case are in reality single services with a multitude of capabilities; (2) IPPs and SBC's payphone unit both compete on packages of services rather than individual services; (3) taken on an individual level, most of the individual services are not competitive comparable services; and (4) SBC simply did not have available any detailed information on each specific payphone location at issue or on the comparative rates paid by end users for different types of calls placed at SBC and IPP payphones. In performing the analysis, SBC argues, it did what the comparable services test requires to the greatest extent possible and it fully justified why slight deviations were necessary. Therefore, SBC argues, the MPTA's exceptions on this issue should be rejected.

The Commission finds that the ALJ properly rejected the MPTA's argument that the LECs should be required to use the UNE method for determining whether the IPP rates comply with the NST. The FCC provided in the Wisconsin Order three options for LECs to use for reaching that determination. The Commission is not aware of any authority, and the MPTA cites none, that would require a LEC to use one method over the others. Thus, the Commission concludes, each company may use the method best suited to its purposes to demonstrate that its IPP rates comply with the NST. If the provider's rates meet the NST through any appropriate analysis, the inquiry is at an end.

Further, the Commission accepts as appropriate SBC's use of aggregated costs and revenues to determine the overhead allocation applicable to IPP services. According to Dr. Currie, the competition it faces for payphone service is really for locations, and the costs vary from location to location as the incentives needed to win the location change. Dr. Currie stated that he did not have the costs broken down to a location level and so aggregated the costs and revenues of like services in order to determine what contribution to overhead SBC's own payphone services supply. It appears to the Commission that Dr. Currie did what made sense in order to use the comparable services method to demonstrate compliance.

The Commission further finds that toll service is an appropriate competitive comparable service for local usage. In so doing, the Commission rejects the MPTA's proposed analysis for usage because it is not structured in the same manner as rates for usage are structured. SBC's IPP rates do not include a call set-up charge that is separate from a duration charge. The Commission is satisfied that SBC's calculations are more appropriate for the manner in which IPP rates are charged.

The Commission further rejects the MPTA's argument that SBC's analysis used costs that the Commission previously rejected in SBC's TSLRIC cost study cases, Cases Nos. U-11280 and Case No. U-11831. According to Dr. Currie, he used approved costs from Case No. U-11280 for constructing his analysis. See, 17A Tr 2161.

Additionally, the Commission rejects the MPTA's argument that SBC understated its cost to provide payphone service because the costs it used do not match those costs presented in the company's imputation analysis filed with the Commission pursuant to the March 1999 order. Dr. Currie explained that the imputation analysis does not match the analysis presented in this case because the two answer different questions. In the present proceeding, Dr. Currie focused on determining the costs to SBC to provide payphone service in Michigan. In the imputation analysis, SBC's expert focused on the costs and revenues associated with Ameritech Payphone Services (APPS), the unit of SBC that provides retail payphone service, among other things. The latter analysis used the rates charged APPS by SBC as the costs. An overestimation of costs for an imputation analysis does no harm, but inclusion of additional inappropriate costs would skew the results of an analysis intended to determine the overhead allocation factor.

Further, the Commission finds that the overhead loading factor as established by SBC's analysis is a reasonable one and complies with the NST, because it is lower than the overhead loading factor implicit in SBC's payphone operations.

However, the Commission finds that SBC's analysis is flawed in one respect, the failure to account for the EUCL charge. The FCC has made clear that non-cost based charges must be accounted for when determining whether the IPP rates comply with the NST. In the Wisconsin Order, the FCC required a credit for the federal SLC, and indicated that any other non-cost based charges must be accounted for as well. There is no dispute that the EUCL charge is not a charge

based on the costs of providing IPP service. SBC argues that the FCC may not require elimination of the EUCL charge, an intrastate charge. However, the preemptive language of 47 USC 276 and the Legislature's directive in Section 318 of the MTA require the Commission to follow the reasoning of the FCC with regard to this charge. As the MPTA points out, SBC may still impose the EUCL charge as it always has, but it must account for it in setting lawful IPP service rates that are compliant with the NST. Therefore, to be compliant with the NST, SBC's rates must take into account the EUCL charge. To the extent that including the EUCL charge would render the IPP rates in excess of the reasonable allocation of the overhead SBC calculated, SBC's IPP rates do not comply with the NST. With this required adjustment, SBC's IPP rates comply with the NST.

B. Verizon

The MPTA argues that Verizon's proposed overhead allocation methodology is not consistent with the ONA/ARMIS[7] methodology permitted by the Wisconsin Order. In fact, the MPTA argues that the ONA/ARMIS methodology is not clear in any FCC order, and its expert was unable to duplicate the results reached by the FCC staff in its calculations pursuant to that methodology. With such lack of clarity from the source, the MPTA argues that the Commission cannot be assured that any analysis performed pursuant to that methodology is consistent with its requirements.

Additionally, the MPTA argues, Verizon did not use its own publicly available ARMIS data as contemplated by the Wisconsin Order. Rather, the MPTA asserts, Verizon used its confidential Uniform System of Accounts (USOA) data that is not available to the public or the complainants. The MPTA argues that use of confidential USOA data is not endorsed by either the Wisconsin

[7]ARMIS refers to Automated Reporting Management Information System, a federal mandatory reporting system, the data from which is publicly available.

Order or the ONA Tariff Order. In the MPTA's view, Verizon's "defiance of the explicit requirements is fundamentally fatal to the PFD's conclusion that Verizon's overhead allocations lead to rates that comply with the NST." The MPTA's exceptions, p. 28.

Further, the MPTA argues, Verizon's use of USOA data does not produce forward-looking cost studies. Rather, it relies on historical accounting information used by the FCC for its separations process. Thus, it identifies embedded rather than forward- looking costs.

Moreover, the MPTA argues, Verizon failed to submit any cost justification for its usage charges assessed on the IPPs. In the MPTA's view, the absence of discussion concerning the usage charges in the PFD makes its conclusions unsustainable.

Verizon responds that the MPTA has mischaracterized the PFD as not based upon the evidence when the PFD articulates its basis on the record evidence and refers the Commission to its brief and reply brief after remand.

In its brief after remand, Verizon notes that the Commission has already found Verizon's rates for IPP service compliant with the NST, which was affirmed by the Court of Appeals. It argues that a review of the Wisconsin Order provides no reason to reach a different outcome in the remand proceedings. It notes that in the original proceeding, its witness testified that he established a price floor at the direct costs of the service. To those direct costs, Verizon adds a 42.9% fully allocated overhead to the service as a reasonable estimate of overhead loadings to yield a price ceiling. It states that "[o]nce a floor and ceiling were established, a statewide composite average tariff rate was computed, using the COCOT [customer owned coin operated telephone] line rate and end user subscriber line charge (EUSLC) and using the COPT [coin operated public telephone] coin line rate and EUSLC." Verizon brief after remand, p. 10. It asserted that no rates

were below the floor and no rates were above the ceiling. Thus, it argues, no adjustment is necessary.

Verizon further argues that, viewed in light of the Wisconsin Order, the Commission's original order in this proceeding reached a correct conclusion. Verizon notes that the NST is a flexible test that does not mandate the use of any single methodology to justify overhead allocation factors. Verizon argues that it used the same data that is reported in its ARMIS filings, just at a more detailed level than the publicly reported ARMIS data.

The Commission finds the MPTA's objections to Verizon's method of demonstrating compliance with the NST should be rejected. Verizon used one of the options the FCC provided for in the Wisconsin Order, the ONA/ARMIS method from the ONA Tariff Order, and interpreted the requirements of that order in a reasonable manner. The MPTA's argument that Verizon did not correctly perform the analysis is undercut significantly by the MPTA's admission that it does not really understand that test and has not been able to duplicate its results. The FCC has indicated that the NST is a flexible test, and has provided different methods of determining whether the payphone service rates are compliant with it. Verizon legitimately chose one of those methods.

Further, the Commission finds that the record demonstrates that Verizon's analysis included usage as a part of the analysis and appropriately accounted for the EUSLC in its analysis of the COCOT rates. However, it appears that Verizon ignored the EUSLC in analyzing the coin line rates. See 12 Tr. (Confidential afternoon session), p. 21. Verizon must therefore recalculate that portion of the cost study. To the extent that the EUSLC places the total price for coin lines above the ceiling, Verizon's rates do not meet the NST. With that correction, the Commission finds that Verizon's use of the ONA/ARMIS methodology for demonstrating compliance with the NST is acceptable.

Finally, the Commission finds that the MPTA's objection to Verizon's use of TSLRIC figures that do not match the results of the Commission's orders in Cases Nos. U-11281 and U-11832 should be rejected. The approved figures were not available at the time that Verizon made its compliance filings in May 1997. The Commission's previous order approved the use of costs as projected by Verizon, and there is no reason now to second-guess those costs based on Commission orders after the fact.

Status as Telecommunications Carriers

The MPTA argues that the ALJ, relying upon the Commission's March 1999 order, mischaracterized its position and found that the MPTA's members were seeking wholesale rates as telecommunications carriers. The MPTA argues that it has never requested that its members be treated as telecommunications carriers in order to receive UNE rates. The MPTA argues that the NST requires a state commission to establish rates for payphone access services based upon the direct cost of the service, plus a cost-based just and reasonable overhead allocation to recover the provider's overhead costs. The MPTA argues that it merely maintained that the LEC's overhead allocation should be set at the same forward-looking UNE overhead allocation approved by the Commission in the LEC's respective cost cases.

The Commission finds that the result sought by the MPTA is the same as if it were a telecommunications carrier. That does not mean that it seeks to have its members defined as telecommunications carriers, with the attendant responsibilities that would entail.

Refunds

The MPTA argues that refunds must be required for charges in excess of rates that comply with the NST. It argues that it has provided the necessary data to enable the Commission to set

NST compliant rates and to compute and order refunds for the period during which SBC and Verizon charged in excess of rates permitted by the NST. It argues that refunds are required by the FCC's Payphone Orders and are consistent with other FCC decisions and state commission decisions implementing the NST.

The MPTA points to Section 318(2) of the MTA and argues that the failure of SBC and Verizon to comply with the NST constitutes a violation of the MTA, which is compensable under Section 610 by refunding excessive rates. Additionally, the MPTA seeks attorney fees and costs. It points out that SBC and Verizon were required to comply with the NST no later than April 15, 1997. Thus, the MPTA argues, the obligation to refund excessive rates should commence on that date.

SBC responds that a Commission-ordered refund would constitute retroactive ratemaking and run afoul of the filed rate doctrine. It argues that the Commission is a statutory creature and is limited in its powers to that granted by the Legislature. SBC argues that those powers do not include granting retroactive rate revisions and refunds.

SBC argues that any authority to order refunds under Section 601 of the MTA is dependent upon a finding that there was a violation of the MTA. SBC insists that no such finding has or can be made in this case, because it merely charged the IPPs according to its filed and accepted tariffs, which were approved by the Commission in the March 1999 order, which was affirmed by the Court of Appeals. SBC argues that this case does not involve a statutorily set rate that the carriers violated, as most of the cases cited by the MPTA had been.

SBC argues that even if Michigan law does not strictly prohibit refunds here, granting the MPTA's request for refunds is not appropriate because the amount of those refunds has not been